United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 75-4037

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 75-4037

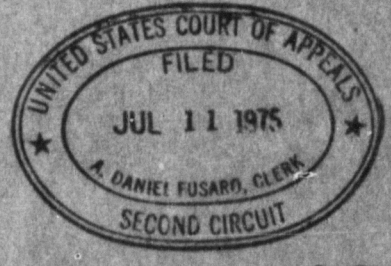
NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BAUSCH & LOMB, INC.,

Respondent.



On Application For Enforcement of an Order
Of The National Labor Relations Board

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

ISSUES PRESENTED

1. Was Respondent a successor to General Dynamics so as to have a duty to bargain with General Dynamics' union representative?

2. Is a finding of successorship appropriate before the alleged successor has acquired its full complement of employees?

3. Is a unit made up of only the employees in the boiler-room at the North Goodman Street plant an appropriate bargaining unit?

4. Did Respondent refuse to hire the complainants to avoid a duty to bargain and thereby violate Section 8(a)(3) of the Act?

5. Is the imposition of a bargaining order an appropriate remedy in the circumstances presented by this case?

STATEMENT OF THE CASE

On January 7, 1974, the Union filed its original charges with the Board alleging a violation of Section 8(a)(3) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151 et seq.). On February 12, 1974, after the Board's investigation was completed, the Union amended those charges to include an alleged violation of Section 8(a)(5) of the Act.

A hearing was held on April 30 and May 1, 1974, before Administrative Law Judge Eugene E. Dixon. On June 21, 1974, Judge Dixon issued his decision finding that Bausch & Lomb had violated Sections 8(a)(1), (3) and (5) of

the Act (A. 5-23).[1] Bausch & Lomb filed timely exceptions to the Administrative Law Judge's Decision and, in a letter dated July 12, 1974, transmitting its Exceptions and Brief to the Board, asked that it be given permission to argue the matter orally before the Board in light of the unprecedented nature of the Administrative Law Judge's findings.

Notwithstanding Bausch & Lomb's contention that the decision of the Administrative Law Judge contained substantial departures from Board and court precedent, the Board on October 25, 1974, issued a Decision and Order which simply affirmed the rulings, findings, and conclusions of the Administrative Law Judge (A. 3-23). In a footnote the Board noted that two of the three members of the Board panel agreed with the Administrative Law Judge's "presupposed" finding of successorship and that, in addition, all three panel members agreed that a bargaining order would be warranted in order to remedy the finding of the Section 8(a)(3) violation (A. 3).

On November 15, 1974, Bausch & Lomb filed a Motion to Reconsider (A. 24-25) and a supporting brief with the Board contending that the Board's Decision and Order was in four specific and material respects contrary to the evidence

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1. "A." references are to the pages of the printed appendix. "S.A." references are to portions of seven pages of the transcript which were inadvertently omitted from the appendix and reproduced as a supplemental appendix at the close of this brief.

in the record and governing legal precedent. Again, Bausch & Lomb requested that it be given the opportunity to argue the matter orally. The Board, nevertheless, on November 29, 1974, denied the motion (A. 26).

By application dated February 19, 1975, the Board requested enforcement of its Order against Bausch & Lomb by this Court.

STATEMENT OF FACTS

During the summer of 1973, Bausch & Lomb entered into negotiations with the General Dynamics Corporation concerning the latter's plant facilities located at 1400 North Goodman Street, Rochester, New York (S.A. 1). General Dynamics, which had utilized the plant for the purpose of manufacturing electronic components for military aircraft, had ceased all operations at the site for more than a year before the negotiations began (A. 44). It was Bausch & Lomb's intent to use the facilities for the manufacturing of ophthalmic equipment by transferring its manufacturing operations from its St. Paul Street plant, one of five operating establishments it maintains in the Rochester area, to the more modern North Goodman Street site. The negotiations were completed late in September of the same year with the purchase of the facility by the Urban Development

Corporation (A. 54, S.A. 1), and the subsequent execution of a long-term lease by the Urban Development Corporation to Bausch & Lomb. The lease covers only the physical plant. Respondent did not assume any of the operations nor purchase any of the physical assets or inventories of General Dynamics (A. 45, 56).

Although General Dynamics had ceased all manufacturing operations at the site for some time, it had leased portions of the plant to tenants who utilized such for warehousing purposes (A. 37, S.A. 1-2). As a result, the agreement between UDC and Bausch & Lomb provided that the Company would not take possession of the premises until the tenants had been allowed a reasonable time to remove the items which were being stored there (S.A. 1-2). After several changes in the target date for possession of the facilities (A. 135), Respondent finally took control of the site, on three days' notice (A. 135), on December 17, 1973 (A. 47, 86, S.A. 1).

In order to quell persistent rumors that the Company was moving its manufacturing facilities out of the Rochester area, the Company made an announcement in July, 1973, that it had entered into negotiations concerning the transfer of its St. Paul Street manufacturing operations to the General Dynamics plant at 1400 North Goodman Street (A. 37-38, 54, S.A. 2).

As part of the negotiations, several of Respondent's management personnel made tours of the facilities in July and August to evaluate the adequacy of the site for manufacturing ophthalmic equipment (A. 60, 65-66, 71, 78-79). While Mr. Samuel Fruscione, the Company's Manager of Corporate Facility Planning (A. 77), was making one such tour in early July of 1973, he first met Mr. Bernard Simpson, the Chief Engineer of the General Dynamics boiler-room (A. 78, 104-105).

In late July, Mr. Simpson approached Mr. Fruscione on another one of his inspection tours and stated that he would be interested in continuing to work in the boiler house following the proposed transfer of the facility to Bausch & Lomb (A. 78-79). Mr. Fruscione told him that he had nothing to do with employment but suggested that Mr. Simpson put in an application to the Employment Department (A. 79). In the course of the conversation, Mr. Simpson also inquired about employment for the three stationary engineers who worked under him at General Dynamics and Fruscione informed him that they should apply individually to the Employment Department (A. 79).

The Respondent had an established corporate policy of maintaining the employment of and utilizing the work skills of existing Company employees (A. 55, 56). In early August of 1973 the policy was reaffirmed by the Company in

connection with the proposed move to the North Goodman Street plant (A. 55, 56).

In this regard, on August 15, 1973, three Company officers toured the North Goodman Street site (A. 60, 65-66, 71). Apparently recognizing Mr. Faro (A. 66, 71), Respondent's Director of Employment and Compensation (A. 70), Mr. Simpson approached the party and introduced himself (A. 66). Mr. Faro, in turn, introduced Simpson to Mr. Roberts, the Company's Vice President of Corporate Industrial Relations (A. 59) and Mr. Burns, Director of Personnel for Bausch & Lomb (A. 65). Mr. Simpson inquired of Mr. Roberts whether there would be employment for himself and his crew in the boiler house if and when the Company took over the plant (A. 60-61). Mr. Roberts made it clear that the Company intended to use its own employees in the boiler house first, but that Mr. Simpson and his men were welcome to apply for employment at the Company's Employment Department (A. 60-61, 66, 108-109).

Subsequently, on August 21, 1973, Mr. Simpson went to Respondent's Employment Department at the St. Paul Street location and filled out a job application (A. 109). Mr. Hulick, an employment interviewer, went over the application with him and in response to Mr. Simpson's question concerning employment for his crew, he informed him of the

Company's policy to utilize its own employees first (A. 110). He did give Mr. Simpson employment applications for the three men to fill out and mail back in self-addressed envelopes (A. 109-110).

On that same day, Mr. Simpson also had brief pre-screening interviews with both Mr. Faro (A. 133) and Mr. Anderson, Corporate Employment Manager (A. 67). Simpson asked both whether the Respondent would consider hiring himself and his crew as a team (A. 68). Mr. Anderson informed him that each case would be considered separately and that his crew would have to apply on an individual basis and file applications if they wished to be considered (A. 68). Mr. Faro responded by restating the Company's policy that it would fill such available positions from within the Company to best utilize the skills of the Respondent's staff (A. 76). Mr. Faro specifically indicated it was likely that the positions within the boiler house would be filled from within Respondent's own organization (A. 76).

Some time after this, as part of his evaluation of the boilerroom, Mr. Fruscione came to the conclusion that it would be advisable for Bausch & Lomb to employ someone who was familiar with the system (A. 79-80). He recommended Mr. Simpson for employment to head the boiler house. He felt that Simpson's possession of the requisite Chief Engineer's

license and his experience in the facility would be helpful to the transfer (A. 79-80).

The Respondent, therefore, extended an invitation to Mr. Simpson to return for a second interview and on September 10, 1973, Mr. Anderson offered Mr. Simpson a job as group leader in the boiler house (A. 68, 138). Mr. Simpson rejected the offer, however (A. 68-69, 138).

On September 24, 1973, following the submission of written applications, the Respondent interviewed Mr. Williams, Mr. Griffin and Mr. Herman, the other three General Dynamics engineers who worked with Simpson (A. 69). Mr. Anderson conducted these prescreening interviews (A. 69). During these interviews all three men were informed that it was Bausch & Lomb's intention to fill available positions in the boiler house with its own personnel (A. 69-70, 92-93, 101), but that the Company would carefully review their applications.

On October 10, 1973, Mr. Faro was authorized to conduct another interview with Mr. Simpson for the purpose of improving the Company's job offer (A. 72-73, 132). Faro offered Mr. Simpson the position of manager of the boiler house at a higher salary level and greater privileges than the Company's September 10 proposal (A. 73-74, 132). The offer was conditioned on proof by Mr. Simpson that he

possessed a Chief's license, as required by City ordinance, and on his passing of the Company's physical exam (S.A. 2). Mr. Simpson immediately accepted the position (A. 75, 132).

Mr. Simpson asked Faro about employment for members of his crew (A. 74-75, 133-134). Mr. Faro reiterated the Company's intention to use its own people to fill these positions (A. 74-75), and informed him that some of the employees who were to be transferred to the boiler-room had already been selected (A. 75). Faro assured Simpson that these employees were well qualified to do the work and that he need not be concerned that he would be working with a green crew (S.A. 3).

On October 17, 1973, Mr. Bess, the Union's business agent, called Mr. Roberts and asked about Respondent's employment situation in the boiler house at North Goodman Street (A. 38-39, 62-63). Mr. Roberts told Mr. Bess there would be no positions available in the boilerroom, since Bausch & Lomb had a sufficient number of qualified personnel within its organization to implement its policy of staffing such units with its own employees (A. 39, 45, 46). Mr. Roberts did say that he would check to see whether there were any other openings available for the three stationary engineers employed by General Dynamics (A. 39, 62-63). Mr. Roberts called Mr. Bess back and informed him that the

Company had some openings in the maintenance department and that Griffin, Herman and Williams could have these jobs if they were interested (A. 38-39, 45-46, 63-64). Mr. Bess told the three General Dynamics engineers of the opportunities in Bausch & Lomb's maintenance department, but they never followed up on the offer (A. 47-48). In fact, Mr. Faro subsequently was informed that Mr. Herman had accepted a job with the Ragu Company (A. 76-77) and that Mr. Williams had accepted a job with the Stromberg Carlson Company (A. 76-77, 136-137). As it turned out, by December 14, 1973, when Bausch & Lomb was first informed that the transfer date would be the following Monday thus freeing the three General Dynamics boilerroom engineers for employment, all three men had already accepted other positions as stationary engineers (A. 76-77, 92, 94, 103-104, 135, 136-137).

During the early part of December, Mr. Simpson apparently had second thoughts concerning his employment with Bausch & Lomb (A. 48). He discussed the possibility of employment elsewhere with Mr. Bess on several occasions and informed him that he would consider taking another job (A. 131). During the week of December 10, 1973, Mr. Bess informed Mr. Simpson that there was a job available at Midtown Holding Company (A. 48-49, 130) and that Mr. Simpson

could have the job for the asking (A. 49). All this occurred without the Company's knowledge.

On Friday, December 14, 1973, the Respondent learned that the transfer date for the facility was to be the following Monday, December 17, 1973 (A. 135). Mr. Fruscione and several Bausch & Lomb employees arrived at the plant at 12:00 noon on December 17 (A. 39-40, 80-81) and proceeded to the boilerroom to implement the transfer (A. 80-81). Upon entering the boilerroom, Mr. Fruscione found Mr. Bess and Mr. Simpson. Mr. Bess identified himself as the Business Agent for Local 71-71A and was introduced to Mr. Fruscione (A. 80). He stated that he was there to see to it that the boilers were in good working order when they were turned over and to help facilitate the transfer (A. 81). In response to a question from Mr. Bess, Mr. Simpson indicated to Mr. Fruscione that the boilers were all in working order (A. 81). Mr. Bess then turned to Mr. Simpson and noted that he was sorry to see that Simpson would have to work with a green crew (A. 40, 81). Mr. Bess repeated his offer of the previous week of a guaranteed job within the union structure (A. 41, 81). Simpson inquired whether that job would be available regardless of the status of his health (A. 41). Bess responded that it would be (A. 41, 81). Simpson immediately resigned his position with Bausch & Lomb and accepted Mr. Bess' offer (A. 51, 81).

Mr. Simpson's unexpected resignation left Respondent without a licensed Chief Engineer to take over the facility (A. 82). Mr. Bess then informed Mr. Fruscione that unless he had such a qualified licensed Chief Engineer he would be forced to shut down the plant (A. 41-42, 82). Since the temperature on December 17 was 12° above zero, there was a probability that shutting the boilers down for any length of time would cause damage to the building (A. 51-52, 82-83).

Coupled with this threat Mr. Bess offered to continue the union contract on similar terms and conditions as the General Dynamics contract (A. 41-42, 50-51, 82-83). Mr. Fruscione responded that he would have to talk to his superior about that since he lacked the authority to accept such an offer (A. 41-42, 83). Mr. Bess inquired how much time Mr. Fruscione would need to contact his superior and, since it was the lunch hour, Mr. Fruscione answered an hour or an hour and a half. Mr. Bess then agreed to keep his men on the job for that period (A. 42, 83). Mr. Fruscione thereafter left the site to inform Mr. Ashcroft, Respondent's Senior Vice-President for Corporate Manufacturing Services (A. 53-54), of what had transpired (A. 83-84).

As soon as Mr. Fruscione had related the events to Mr. Ashcroft, Mr. Ashcroft transferred Mr. Robert Aubel, a

licensed Chief Engineer already in the employ of Bausch & Lomb at its Paul Road boiler house, to the Goodman Street facility (A. 54-55, 84). Mr. Aubel went to Goodman Street and with Mr. Fruscione proceeded to the boilerroom area (A. 42-43, 84). Mr. Fruscione identified Mr. Aubel to Messrs. Bess and Simpson, indicated that Mr. Aubel was a licensed Chief Engineer and told Mr. Bess that the Respondent was prepared to assume control of the plant (A. 42-43, 84-85). Although Mr. Bess was reluctant to acknowledge Mr. Aubel's status as a licensed Chief Engineer without being shown his certificate, once it was confirmed by telephone with the City License Bureau (A. 42-43, 84-85), he instructed Mr. Simpson to give Mr. Aubel a brief tour of the facility and turn it over to Respondent's employees (A. 43).

Thereafter, at the suggestion of one of its employees, the Respondent retained a Mr. Kelly as a consultant engineer solely to aid in implementing the renovation of the boiler system to suit Bausch & Lomb's needs and to assist in familiarizing the staff with the operation of the existing equipment (A. 86-87, 88, 90-91). Because he had worked at the plant for five years for General Dynamics, he was familiar with the Goodman Street boiler house operation (A. 88). Mr. Kelly was a full-time employee at Eastman

Kodak Company and worked for Respondent in his off hours (A. 87). He was paid a consultant's fee of $20 per hour and his services diminished rapidly as the crew learned the workings of the system and were scheduled to be terminated entirely after the introduction of the new equipment completing the renovation of the boiler house (A. 90).

Following the takeover of the Goodman Street plant, the Company transferred a skeleton force of four Bausch & Lomb Utilities Control Operators into the Goodman Street boilerroom to handle operations at a minimal level during the period when the Company was renovating the facility in preparation for the move from St. Paul Street (A. 86, 91). By the time the hearing on this matter was held at the end of April, 1974, the Company had moved only a small division of its entire St. Paul Street complement into the Goodman Street plant with full production at the new plant still months away (A. 90). The four Bausch & Lomb employees who were originally transferred to the boilerroom were still on the job at that site at that time (A. 75-76) and no outside stationary engineers had been hired during the period in question to fill any such positions (A. 76).

ARGUMENT

I.

RESPONDENT DID NOT REFUSE TO BARGAIN IN VIOLATION OF SECTION 8(a)(5) OF THE ACT.

A. Respondent is not a successor employer of General Dynamics.

As pointed out in the General Counsel's brief (p. 9), the doctrine of successorship was fashioned to protect employee rights in situations involving "a mere change of employers or of ownership in the employing industry . . . ." NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 279 (1972). The well-established test for determining whether an acquiring employer is a legal "successor" and therefore obligated to bargain under Section 8(a)(5) of the National Labor Relations Act was concisely set forth by the Circuit Court in NLRB v. Zayre, 424 F.2d 1159 (5th Cir. 1970), as follows:

> The acquiring employer is the successor to the obligations of his predecessor if there is continuity in the business operation. "The crucial question in determining if the certification is binding on the successor employer is whether the employing industry remains essentially the same after the transfer of ownership." NLRB v. Auto Ventshade, Inc., 5 Cir. 1960, 276 F.2d 303, 304; NLRB v. Valleydale Packers, Inc., 5 Cir. 1968, 402 F.2d 768. [424 F.2d at 1162. Emphasis added.]

In Wm. J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971), this Circuit reiterated these basic principles and found:

> All of the important factors which the Board has used and the courts have approved are present in the instant case: "continuation of the same types of product lines, departmental organization, employee identity and job functions." [441 F.2d at 915.]

Subsequently, in NLRB v. Burns Int'l Security Services, Inc., supra, the Supreme Court affirmed the Second Circuit's decision and cited with approval the Zayre decision and several other circuit court decisions enforcing Board orders based on the very same test. 406 U.S. at 281. Moreover, as the Supreme Court noted in Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182, n. 5 (1973), "so long as there is a continuity in the 'employing industry,' the public policies underlying the [successorship] doctrine will be served by its broad application."

Respondent in its brief to the Administrative Law Judge, in its brief to the Board, and in its motion to reconsider urged that the instant case be evaluated in light of these tests which, as the Second Circuit noted, had been used by the Board and approved by the courts. Nevertheless, the Board in its decision in the instant case gave no indication that it considered any of these well-established factors in making its determination that Bausch & Lomb was a

successor employer to General Dynamics. The Board, moreover, readily acknowledged in a footnote to its Decision that no express finding of successorship was made by the Administrative Law Judge (A. 3). The Board simply noted that the Administrative Law Judge's reliance on the Board's decision in Barrington Plaza and Tragniew, Inc., 185 NLRB 962 (1970), "presupposed" that successorship was present.

Any reliance placed on Barrington Plaza and Tragniew, Inc., supra, as a rationale for establishing successorship, however, is obviously misplaced. In that case the Board specifically found that "the Respondent continued to operate the property in substantially the same manner as had its predecessors . . . ." 185 NLRB at 962. In the instant case, on the other hand, Respondent's operation as a manufacturer of ophthalmic equipment was not in any significant respect shown to be similar to General Dynamics' operation as a manufacturer of electronic aircraft components. Tragniew acquired a business and continued the operational structure and practices of the previous owner of the shopping plaza, while Bausch & Lomb merely acquired a building into which it planned to move certain existing operations and implement its own operational structure and practices.

Despite Respondent's urging at various stages of this case, the Board provided no rationale or even the

slightest explanation for its finding of successorship until submission by General Counsel of the Brief for the Board to this Court (General Counsel's Brief p. 12-13, n. 8). General Counsel's theory, apparently, is that all that is required for a finding of legal successorship is continuity of functions[2] in an appropriate unit. This rationale devised by the General Counsel, however, is not an adequate basis for review, since "the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action . . . .'" NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 444 (1965); accord, Associated Industries of New York State, Inc. v. United States Department of Labor, 487 F.2d 342, 354 (2d Cir. 1973). Successorship should not be imposed by rote or on a basis other than analysis of the record before the agency. cf. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971).

Moreover, General Counsel's post hoc rationalization is untenable and unprecedented. General Counsel's theory loses sight of the fact that the boilerroom was only one small part of a very large plant. General

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2. The functions of the boilerroom employees did, however, change since Bausch & Lomb, unlike General Dynamics, staffed its boilerroom with "both engineer types and maintenance types" (A. 58, 91).

Counsel correctly states the test, "whether the operation is 'essentially the same as that previously conducted . . . .'" Wm. J. Burns Int'l Detective Agency, Inc. v. NLRB, supra, 441 F.2d at 914-915, but misconceives its application by the Board and the courts. The "operation" referred to by the Board and the courts in successorship cases is that of the entire enterprise, not any particular operating cell within the enterprise. "[T]he critical question in determining if the employer is a 'successor,' is whether the employing industry is substantially the same after transfer of ownership." NLRB v. Polytech, Inc., 469 F.2d 1226, 1230 (8th Cir. 1972). Emphasis added.

Under General Counsel's theory, a finding of successorship would require no more than that any appropriate bargaining unit of employees survive the change in ownership and the change in the essential nature of the enterprise. The Board has never so held and if, as General Counsel suggests, it did so in the instant case, it clearly would have overruled several recent decisions holding that continuity of the employing industry is the crucial inquiry. E.g., Radiant Fashions, Inc., 202 NLRB 938 (1973); Georgetown Stainless Mfg. Corp., 198 NLRB No. 41 (1972); Galis Equipment Co., 194 NLRB 799 (1972); Gladding Corp., 192 NLRB 200 (1971); Lincoln Private Police, Inc., 189 NLRB 717 (1971).

Moreover, if the Board has indeed changed its policy on successorship, it should have done so only after full consideration by the entire Board of the ramifications of such a major change in policy instead of simply endorsing an Administrative Law Judge's determination which did not even clearly articulate a finding of successorship.

That the Board did not intend to overrule this line of cases, however, is evidenced by the Board's reiteration of their common holding that substantial continuity of the employing enterprise is an indispensable prerequisite for a finding of successorship in a case decided while the instant case was pending before the Board. In Nova Services Co., 213 NLRB No. 14 (1974), the Board affirmed the following findings and conclusions of the Administrative Law Judge:

> [W]hile it is true, as the Board said in Lincoln, that successorship has been found in situations where a new employer acquires less than a predecessor's entire business, or hires less than a majority of the predecessor's workforce, present always in those situations has been the basis for a finding that there was no basic change in the employing industry as a result of the takeover. That is not the case here. The fact that a part of Respondent's business was duplicative of a portion of one project which Sanitas had previously performed does not warrant the conclusion that there has been a substantial continuity in the employing enterprise.

Even more recently, in United Maintenance & Mfg. Co., 214 NLRB No. 31 (1974), the Board, citing Lincoln Private Police, Inc., supra, warned:

> [O]ne should not lose sight of the fact that the Board, in determining a new employer's obligation to bargain with the union which represented the predecessor's employees, does not rely on any one factor exclusively, but looks to all the factors which might have any relevance on (1) the continuity of the employing industry, and (2) employee's desires with regard to continued representation. [214 NLRB No. 31, n. 14.]

General Counsel would now, however, have this Court believe that the Board looked to and based its findings upon only one factor -- the fact that three employees would view their jobs as unchanged.

As stated previously, Respondent is engaged in the manufacture of ophthalmic devices. General Dynamics, on the other hand, manufactured electronic components for military aircraft at the Goodman Street plant prior to its closure. Respondent acquired the facility at Goodman Street solely to obtain the physical plant, and not any aspect of General Dynamics' operation as an electronics manufacturer. Bausch & Lomb simply acquired a more modern building to which it could transfer its ophthalmic manufacturing operations. The existence of a basic change in the employing industry is beyond question. Under Bausch & Lomb, the North Goodman Street plant was to be operated as part of an integrated multi-plant enterprise in the Rochester area (Gladding

Corporation, supra), with different products, customers, supervision, organizational structure, and employees.[3]

Since there is no evidence in the record which would support the finding that Respondent is a successor, Respondent did not succeed to General Dynamics' duty to bargain and could not have violated Section 8(a)(5) of the Act. Moreover, even under General Counsel's novel theory, Respondent would not be a successor, since the boilerroom at the North Goodman Street plant is not an appropriate bargaining unit.

B. The Board's determination that the boilerroom at the North Goodman Street plant is an appropriate bargaining unit after the transfer is arbitrary and unreasonable.

It is well-established that:

> A unit finding by the Board "involves of necessity a large measure of informed discretion," . . . and, where it is supported by substantial evidence, will not be reversed "in the absence of an 'arbitrary or capricious exercise of administrative discretion.'" [Wheeler-Van Label Co. v. NLRB, 408 F.2d 613, 616 (2d Cir. 1969).]

In the instant case, however, the Board's unit determination is not supported by substantial evidence and was clearly arbitrary and capricious.

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3. Even if the three General Dynamics boilerroom employees had been retained, they would constitute only a small fraction of Respondent's employee complement after the move (A. 90).

In his decision, the Administrative Law Judge somewhat simplistically concluded that since the boilerroom employees at the 1400 North Goodman Street plant had been covered by a contract with General Dynamics prior to transfer of the plant to Respondent, a unit of such employees was presumptively valid after the transfer also (A. 16).[4] For this proposition he relied solely on the Board's decision in Barrington Plaza and Tragniew, Inc., supra. In Barrington Plaza, however, the Board indicated that its consideration of the scope of the unit previously subject to a contract, as a basis for an appropriate bargaining unit determination, was a sufficient basis only "absent evidence which would indicate that such a unit is otherwise inappropriate." 185 NLRB at 962, n. 5. The record in the instant case, however, clearly establishes that the contract unit was inappropriate after Respondent took control of the North Goodman Street plant. In fact, there was abundant and substantial uncontroverted evidence that the General Dynamics contract unit was no longer appropriate, and absolutely no evidence other than the extinguished contract that the unit would continue to be appropriate.

In cases involving an integrated multi-plant organization such as is present in the instant case, "[t]he

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4. The Board made no specific comment on the question of the appropriateness of the unit in its Decision and Order.

Courts have not hesitated to set aside a finding of the appropriateness of a branch as a bargaining unit where the evidence showed centralized control over the principal aspects of operations and employee relations." Wayne Oakland Bank v. NLRB, 462 F.2d 666, 667-68 (6th Cir. 1972). In NLRB v. Solis Theatre Corp., 403 F.2d 381 (2d Cir. 1968), the Court noted that it was "aware of the difficulties in making unit determinations that, on the one hand, effect the policy of the Act to assure employees the fullest freedom in exercising their rights and, on the other hand, respect the interest of an integrated multi-unit employer in maintaining enterprise-wide labor relations." 403 F.2d at 382. The Court found no substantial evidence to support the Board's single location unit finding and deemed the Board's action under circumstances where the local manager's authority was limited to overseeing the daily activities of the employees to be arbitrary and unreasonable. Solis Theatre Corp., supra, 403 F.2d at 382-83. In a subsequent case, the Second Circuit summarized its decision in Solis Theatre as holding that "the Board may not, without substantial justification, fractionate a multi-unit operation whose labor policy is centrally directed and administered." Continental Ins. Co. v. NLRB, 409 F.2d 727, 729 (2d Cir. 1969).

The fact that the contract of General Dynamics covered only the North Goodman Street boilerroom is not by

itself "substantial justification" for finding such a unit appropriate in the context of Bausch & Lomb's integrated operations. In addition, in NLRB v. Burns Int'l Security Services, Inc., supra, 406 U.S. at 287-88, the Supreme Court noted that "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and the nature of supervision." The policy is just as significant where the takeover involves not an entire business but merely a plant as in the instant case. Certainly employers would be reluctant to take over such moribund plants if their freedom to manage and institute centralized personnel administration would be constrained by the existence of a preexisting bargaining unit.

General Counsel, in the portion of his brief addressed to this question, has again adopted a post hoc rationalization as a substitute for full and fair evaluation, by either the Administrative Law Judge or the Board, of the factors traditionally considered in making an appropriate unit determination. General Counsel suggests, for example, that Respondent's hiring of an outside consultant demonstrates that the North Goodman Street boilerroom employees possess different skills than those possessed by

employees in other Company boilerrooms. This clearly is not the case. The standards and licensing requirements of the Rochester City Code insure that skills at the same license levels are similar (A. 105-106). Moreover, the Company hired a consultant solely because Mr. Simpson, not one of the unit employees, withdrew his acceptance of the supervisory job in the Goodman Street boilerroom at the last moment and the Company needed someone with experience with the equipment to replace Mr. Simpson's experience and assist in implementing new equipment.

Similarly specious is General Counsel's contention that a waiver by General Dynamics of any objections to the contour changes the unit has undergone somehow applies to Bausch & Lomb despite a complete lack of privity between General Dynamics and Respondent. Finally, Respondent never asserted, as General Counsel suggests, that the Goodman Street boilerroom was not a more appropriate or the most appropriate unit. On the contrary, Respondent in both its brief to the Administrative Law Judge and its brief to the Board argued that a unit made up of only the employees in the Goodman Street boilerroom is simply not an appropriate bargaining unit.

In 1959, the Board certified a bargaining unit comprising the boilerrooms at both the Carlson Road and 1400 North Goodman Street plants of General Dynamics (A. 33). Thereafter,

in 1962, General Dynamics underwent a reorganization, split the two plants into separate corporate divisions and, there then being no operating level connection between the two boilerrooms, bargained with the Union for different agreements covering the separate plants (A. 33). After the transfer of the 1400 North Goodman Street plant to Respondent, however, Respondent operated the 1400 North Goodman Street boilerroom, in conjunction with its four other boilerrooms in the Rochester area, as part of a centralized organization or, in other words, on the same basis that General Dynamics had operated the boilerroom at the time of the Board's original certification and before General Dynamics' corporate reorganization. Logic dictates that the type of unit originally certified by the Board is once again the only appropriate unit and that a unit made up of only one boilerroom of Respondent's Utilities Control Department would be clearly inappropriate. When Respondent acquired the North Goodman Street facility in December 1973, its own organization, not the organization of General Dynamics, became the relevant factor in determining the appropriate bargaining unit. Since the personnel function and operational responsibility were once again centralized, the appropriate unit would be a multi-plant unit as the Board had originally certified.

The record contains substantial uncontroverted evidence that operational and labor policies are centrally directed and administered even though the Board and its Administrative Law

Judge abdicated their duties to evaluate such. As pointed out, Respondent has five heating plants in the Rochester area, staffed by Utilities Control employees (A. 57-58). One corporate officer has overall supervisory responsibility for the five heating plants although, as in Solis Theatre Corp., supra, there are supervisors in each heating plant (A. 57-58). The plants have identical job classifications and pay schedules (A. 58). Moreover, under Bausch & Lomb's operational structure, while each heating plant has its own maintenance staff, the overall maintenance program is handled on an area-wide basis (A. 58). There is employee interchange between the various plants in the case of staffing requirements for holidays, vacations, sickness or emergencies (A. 56). An example of this interchange was the transfer of Mr. Aubel to the Goodman Street facility to cover the emergency created by Mr. Simpson's unexpected departure on December 17, 1973 (A. 59). Moreover, Mr. Ashcroft testified that in the event of a layoff, employees in the Utilities and Control Department would bump between plants (A. 59). Most importantly, the Company's labor policy is centrally formulated, directed and administered for all plants (A. 55, 59) and the recruiting of all employees is also centralized (A. 67). In short, the Goodman Street boilerroom employees are an integrated part of Respondent's overall Utilities Control Department, are subject to centralized personnel decisions, and would

not be an appropriate separate unit. Solis Theatre Corp., supra; accord, Wayne Oakland Bank v. NLRB, supra; NLRB v. Pinkerton's, Inc., 428 F.2d 479 (6th Cir. 1970); NLRB v. Pinkerton's, Inc., 416 F.2d 627 (7th Cir. 1969).

C. There is no evidence that the Union represented a majority of Respondent's employees at the North Goodman Street boilerroom at a time when Respondent had placed a full complement of employees there.

Even if it is assumed that Respondent is a "successor" to General Dynamics and that the North Goodman Street boilerroom is an appropriate unit, General Counsel made no showing that a bargaining obligation ever matured. In NLRB v. Burns Int'l Security Services, Inc., supra, the Supreme Court observed:

> [I]t may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 USC § 159(a). Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June. [406 U.S. at 295.]

Likewise, in the case at hand, if Respondent was to have an obligation to bargain, it could not have matured until Respondent had staffed the boilerroom with the complement of employees necessary to operate the boilerroom on the

multi-shift and full-production basis that Respondent contemplated. It certainly would not have matured at the time Respondent took control of the 1400 North Goodman Street plant, even if Respondent had hired the three employees that had been retained by General Dynamics as a skeletal force to maintain some heat in the plant while it was used merely as a warehouse and storage facility (A. 37, S.A. 1-2), as opposed to the full power requirements necessitated by production when the plant was fully operational.

General Counsel notes in his brief that "it is clear that the Company had hired its initial complement and was 'running the plant' in January 1974" (General Counsel's Brief p. 20). The Supreme Court, of course, referred to a "full complement" not an "initial complement." In any event, General Counsel's reference to the Company's "running the plant" is grossly misleading. By running the plant, Mr. Fruscione clearly was referring to the fact that one of the boilers in the heating plant was operating (A. 86-89). Even by March of 1974, the Company was still only using a skeleton force and operating only one boiler at a fraction of its capable output (A. 86). At the time of the hearing "just one small division of about 100 people" had been moved into the Goodman Street facility (A. 90).

In Hayes Coal Co., 197 NLRB 1162 (1972), relied upon by General Counsel,[5] the Board stated that "[t]he correct test is whether, at the time of recognition, the jobs or job classifications designated for the operation involved are filled or substantially filled and the operation is in normal or substantially normal production." 197 NLRB at 1163. There is no evidence in the record which would sustain either element of this test.

Furthermore, General Counsel's analysis takes no account of the fact that, unlike General Dynamics, Bausch & Lomb places maintenance employees as well as engineers within its boilerrooms (A. 58, 91). Therefore, despite General Counsel's unsupported assumption, new employees with dissimilar skills would occupy different classifications once Bausch & Lomb had the plant in substantially normal production.

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5. General Counsel also cites Clement-Blythe Companies, 182 NLRB 502 (1970), enforced, per curiam, 77 LRRM 2373 (4th Cir. 1971). In that case, however, the Board noted that it was significant to its holding that Respondent there was in the construction industry where the fluctuating and unpredictable nature of the construction activities cause the Board to emphasize giving employees an early choice rather than waiting for a full complement. Moreover, the Board's original order has previously been denied enforcement by the Fourth Circuit because of the Board's failure to state its reasoning for not awaiting a full complement. NLRB v. Clement-Blythe Companies, 415 F.2d 78 (4th Cir. 1969).

For any one of the above three reasons, therefore, Respondent could not have been a sucessor to General Dynamics. Bausch & Lomb, moreover, did exactly what any Company would do when faced with a move of a few blocks to another plant. It adopted the logical and practical approach of utilizing its own employees in the new facility as opposed to replacing them with outsiders. The Board, however, now somewhat illogically suggests that an employer may not follow such a course but must instead give preference to the outsiders or face a violation of Section 8(a)(3) of the Act.

II.

RESPONDENT DID NOT VIOLATE SECTION 8(a)(3) OF THE ACT BY REFUSING TO HIRE THE CO. PLAINANTS TO AVOID AN OBLIGATION TO BARGAIN WITH THE UNION.

By considerably distorting the facts in this case, the Administrative Law Judge found that "Respondent's failure and refusal to hire the three General Dynamics experienced engineers for its newly acquired Goodman Street facility was grounded in its determination to avoid bargaining with the Union . . ." (A.14). However, the uncontroverted facts are that Respondent did offer employment to the General Dynamics engineers (A. 39, 45, 63-64). Moreover, the Company could not have been motivated by a determination to avoid bargaining with the Union, since, as pointed out above, it would have had no such obligation in any event under then-existing legal precedent.

The following illogical and severely strained analysis illustrates the Administrative Law Judge's failure to properly interpret the record in this case:

> Being fully cognizant of the complexity of the operation it was acquiring and resigned to the necessity of securing someone with experience to run it, Respondent was unwilling and refused to hire the available personnel that would completely eliminate the problem. Indeed, so fixed was Respondent's opposition to this logical and obvious solu-

> tion of its difficulties that it was willing to pay out in excess of $2,000 for special consultation fees (which were still being paid out at the time of the hearing) to instruct its own "qualified" people in the performance of their newly assigned duties (A. 14-15).

Respondent was indeed aware of the need for certain familiarity with the Goodman Street boilerroom. That is why it hired Mr. Bernard Simpson in the first place. Mr. Simpson was familiar with the equipment at Goodman Street and his hiring was conditioned upon his passing a medical exam and possessing the requisite Chief Engineer's license (S.A. 4-5). It should be noted at this point that it was a Chief Engineer's license that was required by the Rochester City Code for the Goodman Street plant and not a "first class engineering rating" as found by the Administrative Law Judge (A. 9; 53, 107). It should also be noted that none of the other three General Dynamics engineers possessed a Chief Engineer's rating, nor were they eligible to do so (A. 94, 95-96, 100).

It was not until the Union pulled its last minute power play, which amounted to nothing less than extortion, that Respondent was forced to seek another solution. Obviously, Respondent had no obligation to yield to the threat of a shutdown of the heating plant in 12° weather

(A. 51-52). Nor did it have to renege on its promise of the boilerroom jobs to its own employees with many years of service, in favor of the three General Dynamics engineers. The Company followed a reasonable, logical and perfectly consistent course of action by transferring Mr. Aubel to satisfy the requirement of having a Chief Engineer and by retaining Mr. Kelly as a consultant because of his experience with the Goodman Street equipment. It is submitted that the Company's actions under such circumstances represented the obvious solution, and not that proffered by Judge Dixon in his decision.

It was Bausch & Lomb's stated policy to utilize its own employees for available positions within the Company (A. 55). At the time Simpson suddenly resigned (A. 51, 81-82), Bausch & Lomb employees had already been selected for transfer to the Goodman Street positions (S.A. 3-4). There was a Chief Engineer already in the employ of the Company (A. 42-43, 54-55 84), and, in addition, Mr. Kelly was available to assist them in becoming familiar with the Goodman Street equipment and could help the Company implement planned innovations (A. 86-87, 88, 90-91).

It would have been totally repugnant to established Company policy and the expectation of the Bausch &

Lomb employees designated for transfer to have staffed the boiler house with the General Dynamics engineers. Moreover, Judge Dixon's implicit questioning of the qualifications of those employees is not supported by the record. First of all, each had to be a licensed engineer in order to operate equipment in a boilerroom (A. 53). Secondly, Mr. Kelly did not train or instruct the Bausch & Lomb engineers to perform their duties. His function was to assist them in becoming familiar with the equipment and to help in redesigning it to meet the performance requirements of Bausch & Lomb (A. 86-87, 88, 90-91).

The sole basis for Judge Dixon's finding a violation of the Act is contained in the following exchange between Counsel for Charging Party and Mr. Faro (A. 137):

> Q. [I]f you have that kind of a problem, admittedly so, and if also you -- you intended to give these men jobs in other areas, why did you not continue them in the job that they knew so that you would not have a problem?
>
> A. I can't answer that.

What Judge Dixon failed to recognize was that it was not Mr. Faro who dealt with the problem created at the last minute by the Union, but Mr. Ashcroft who was ultimately responsible for operating the boilerroom. The matter at that

point was not an employment matter with which Mr. Faro would have been concerned, but an operational matter to be handled by Mr. Ashcroft as the overall corporate supervisor of the Utilities Control Department (A. 54, 56-58, 63). Mr. Faro obviously could not answer for the rationale behind Mr. Ashcroft's solution to the crisis. Yet this one response, and this one response alone, in the face of a record containing abundant uncontroverted evidence to the contrary, was seized upon by the Administrative Law Judge and used as the sole support for his finding of a violation of section 8(a)(3) and ultimately section 8(a)(5).

The Administrative Law Judge also found that Respondent disregarded and rejected the three engineers' applications for other jobs (A. 14-15). There is absolutely no support in the record for such a finding. To the contrary, the record indicates that Respondent accepted applications from all three and on October 17, 1973, offered all three jobs in the maintenance department through Mr. Bess (A. 39, 45-46, 63-64). The Administrative Law Judge somehow characterized the failure of the Company to follow up on these job offers as a refusal to hire by Respondent. Respondent clearly had no obligation to pursue these individuals until they accepted the offers. In fact it

would seem more appropriate to find that under the circumstances it was the individual's obligation to pursue these offers with Respondent. Since they chose not to do so, the obvious conclusion is that they were not interested. This is further supported by the fact that all three took jobs elsewhere in advance of the transfer to Goodman Street (A. 76-77, 92, 94, 103-104, 135, 136-137).

Similarly, the Administrative Law Judge's assessment of Mr. Simpson's credibility lacks adequate support. He found, for example, that "Simpson maintained credibly that he was reluctant to assume the supervision of the operation without his experienced crew" (A. 9). Such a finding is preposterous in light of the fact that Simpson knew that Respondent by law could only use qualified licensed stationary engineers to operate the boilerroom equipment (A. 105-106). Mr. Simpson also testified that Mr. Faro told him, "If we touch any of those men, we have to take the union contract and you know that this Company has never dealt with the union and never intends to deal with the union" (A. 118). Mr. Faro, however, categorically denied making the statement (A. 133).

Furthermore, the underlying assumption of the alleged statement indicates that the words were Mr Simpson's and not Mr. Faro's. It is clear that even if Respondent had hired all the former boilerroom employees it

would not have been compelled to "take the union contract." NLRB v. Burns Int'l Security Services, Inc., supra. Moreover, fear of a bargaining obligation under 8(a)(5) could not have motivated Respondent, since it knew it was not a successor employer to General Dynamics under any prior interpretation by either the Board or the courts (Point I.a., supra), and Mr. Faro, despite his thirty-two years of industrial relations experience (A. 133), could not have predicted the Board's complete reversal of such precedent in the instant case.

For some twenty years, Respondent has had a policy of maintaining employment and filling openings by using its own employees (A. 55, 56-57). The policy was based on the sound business consideration that it would encourage employee loyalty and stabilize the work force by allaying fears of job loss. Such fears would otherwise be quite justified since a number of firms had indeed left the Rochester area in the past two years and Respondent itself had built new plants in Maryland and Mississippi (S.A. 2). Thus, Respondent determined in August of 1973 to apply the policy with respect to the contemplated move to the more modern facility at Goodman Street (A. 55-56). Respondent informed all applicants for positions in the Goodman Street

boilerroom of its policy and its intent to apply the policy in filling those positions with its own employees first, if possible (A. 39, 45, 46, 55, 56, 57, 61, 63, 66, 71-72, 75, 76, 93, 103, 103, 124). This business policy was indeed consistently followed and no outsiders were hired by Respondent to work in the Goodman Street boilerroom (A. 76). Furthermore, all the Bausch & Lomb employees transferred to the Goodman Street boilerroom were still there at the time of the hearing (A. 75-76).

The situation in the instant case is strikingly similar to that in Crotona Service Corp., 200 NLRB 738 (1972) (approvingly cited by the Supreme Court in Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249, ___, n. 8 (1974)), where the employer had followed a previously established business policy of filling new positions with a cadre of its own experienced employees. There was also testimony in that case with respect to alleged anti-union statements, which an officer of the employer credibly denied. The Board affirmed the ruling of the Administrative Law Judge that under the circumstances the employer did not discriminate against the predecessor's employees and therefore did not violate Section 8(a)(3).

It is submitted that in the case now in question

the Union was obviously frustrated by its inability to persuade Respondent to abandon its legitimate policy favoring its own employees as well as its failure to force Respondent to capitulate by its eleventh hour extortion. The Board's condonation of such tactics certainly does not effectuate the policies of the Act. The lesson of the Board's finding is that an employer is ill-advised to make an early, open and good faith pronouncement of its intentions in situations such as the one at hand.

The Administrative Law Judge cited the following language of the Supreme Court from a footnote in its recent decision in Howard Johnson Co. v. Detroit Local Joint Exec. Bd., supra, 417 U.S. at ___, n. 8, to support his findings (A. 15-16):

> Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the Union.

Respondent clearly could not have had the first of these two illegal motives, since it had, in fact, extended an offer of jobs to the three engineers and had hired Mr. Simpson, himself a Union member. Respondent also could not have had the second motive, since it could not, as previously noted, have believed that by hiring the three General Dynamics engineers it would incur an obligation to bargain. Since Respondent

did not refuse to hire and, in any event, did not have a discriminatory motive, it cannot be found to have violated Section 8(a)(3) of the Act.

III.

THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT A BARGAINING ORDER ON THE BASIS OF AN EGREGIOUS VIOLATION OF SECTION 8(a)(3) OF THE ACT.

The Board found that Respondent refused in an egregiously discriminatory manner to employ union members in violation of Section 8(a)(3) of the Act and, relying on its decision in Piasecki Aircraft Corp., 123 NLRB 348 (1959), entered a bargaining order as a remedy. The Board, however, failed to recognize the significant distinction between Piasecki and the instant case. In Piasecki, the Board found that:

> Had not the Respondent later engaged in illegal discrimination because the persons in the unit had demonstrated their continued adherence to the Union, the Respondent would have become the employer of employees in an appropriate production and maintenance unit represented by the Union; and, as such, the Respondent would have been obligated to bargain with the Union upon request. [123 NLRB 348, 350. Emphasis added.]

It was clear from the record in the Piasecki case that the union represented a majority of the employees in an appropriate unit at the time when Piasecki had hired a full complement of employees. As pointed out by the Circuit Court in enforcing the Board's order, the record showed that:

> [B]y March 1957 Piasecki had a roster of 155 to 175 production workers, performing in jobs quite similar to those in which the Bellanca workers had served.
>
> ...[I]n the light of the newly signed authorization cards by 138 of the 139 employees in the production and maintenance unit which were signed on November 23 [the day before Piasecki took over], Piasecki would have been required to bargain with the Union. [Piasecki Aircraft Corp. v. NLRB, 280 F.2d 575, 591 (3rd Cir. 1960), cert. den., 364 U.S. 933 (1961)].

Hence, the Board's bargaining order in Piasecki was based upon evidence of majority representation. By giving the union the opportunity to bargain for the majority that it would have represented but for Piasecki's unfair labor practices, the Board's order was remedial and effectuated the policies of the Act. In the instant case, on the other hand, there is no evidence that the Union represented a majority of the employees in an appropriate unit at the time when Respondent had placed a full complement of employees in the unit. A bargaining order in these circumstances cannot be justified on the basis that it will restore the situation to what it would have been but for the violations of Section 8(a)(3) found by the Board. Indeed, far from effectuating the policies of the Act as required by Section 10(c), the Board's bargaining order will in all likelihood frustrate fundamental policies of the Act by

depriving the balance of the maintenance and operating employees now working in the Goodman Street boilerroom of their right to refrain from activities protected by Section 7 of the Act and their right to an election by secret ballot or majority representation as provided by Section 9 of the Act. Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961).

Respondent has found no precedent that would support a bargaining order in circumstances such as are found in this case. The Supreme Court has, of course, held in NLRB v. Gissel Packing Co., 395 U.S. 575, 613-614 (1969), that a bargaining order is appropriate in cases where serious unfair labor practices have been committed which "interfere with the election process and tend to preclude the holding of a fair election . . . ." 395 U.S. at 594; accord, MPC Restaurant Supply Corp. v. NLRB, 481 F.2d 75 (2d Cir. 1973). While a bargaining order in such cases may well be the only available effective remedy when the electoral atmosphere is polluted by the coercive effects of substantial unfair labor practices, there was no electoral process involved in the instant case. Since the Board is not concerned with the ability to conduct a fair and reliable election in the instant case, the traditional Board remedies of an offer of reinstatement and backpay would adequately effectuate the policies of the Act.

CONCLUSION

For the foregoing reasons, the Court should deny enforcement of the Board's Decision and Order in this case.

Dated: July 9, 1975

Respectfully submitted,

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Herbert Ashcroft (direct examination by Mr. McGee)

90 Q. Now, you were in the courtroom this morning when there was testimony alluding to the changing of a closing date. I wish you would clarify for us what transaction took place and why the date of December 17th was the selected date for the take-over, physical take-over of the premises by Bausch & Lomb?

A. All right. We made an offer to General Dynamics sometime in mid-July. That offer was contingent upon financing by UDC. UDC, by the end of September, agreed to financing the 1400 North Goodman Street Plant and Carlson Road. General Dynamics had 90 days in which to vacate the premises at North Goodman Street and, as I testified earlier, they had some warehousing operations in the plant. So, in a sense we could not take that plant over until they had vacated. General Dynamics, to my knowledge, was searching out other places to move warehousing opertions they had at Goodman Street.

Q. You mean the tenant's operation?

A. They were possibly Stromberg Carlson.

Q. They had some of their own warehousing...

91 A. Stromberg Carlson leased premises.

Q. The relation between Stromberg Carlson and General Dynamics...

A. Stromberg Carlson had 200,000 square feet of warehousing in the main plant. And they were paying rent to General Dynamics in St. Louis. Now, General Dynamics had to notify Stromberg to get out. It took that much time. They had 90 days with the agreement.

* * * * * *

Herbert Ashcroft (cross examination by Mr. Paley)

99 Q. You did mention people were concerned about the possibility of Bausch & Lomb moving out of the Rochester area?

A. Yes. Because in the St. Paul Street complex where we have lens operations, we have parts operations and precision optics, those operations, in part, are going out of the State. We are not moving everything out of St. Paul Street through Goodman Street. We stated this several times in the past.

Q. You have another production facility outside of New York?

A. Yes, two in Maryland and one in Mississippi.

* * * * * *

Ellis Faro (direct examination by Mr. McGee)

149 Q. And during this second interview, did Mr. Simpson reiterate his desire to keep his crew in tact?

A. Yes.

150 Q. And in substance, can you recall how he expressed himself?

A. Well, basically, like we've been hearing, that he felt he wanted an experienced crew. I reiterated that we were discussing him only and that I'm sure that he would have an experienced crew. Nothing had been firmed up at that time. We were making considerations internally.

Q. I see. In other words, you made it clear to him that the offer that was being made was being made for him and for him alone, is that correct?

A. Correct.

* * * * * *

Ellis Faro (direct examination by Mr. McGee)

154 Q. Well, didn't you state or reiterate that you were talking specifically about a job offer to him alone, him only?

A. Oh, yes.

Q. And that you had already selected some of the men who were going to work in the boilerroom?

A. I hadn't selected. Some had been selected, yes.

155 Q. How did you learn that, from whom?

A. Well, one from Mr. Vink managing the employment organization, we're aware that these transfers are taking place that people are being considered for upgrading and consideration.

Q. And this is October 10th?

A. Yes.

* * * * * *

Ellis Faro (cross examination by Mr. Paley)

169 Q. Now, the September 10th meeting with Mr. Simpson in which you gave him the first offer of employment, did you reiterate that policy?

A. I'm sure I did.

Q. In that employment to Mr. Simpson, was that conditioned in any way on his providing any credentials?

A. Yes. The offer was contingent upon his having a chief's license.

170 Q. So the offer to Mr. Simpson then was conditioned on the part of the company in what respect?

A. That he pass our medical, that he have a chief's credential which we understand was necessary for fulfilling that assignment.

Q. And the October 10th offer?

A. Yes.

Q. So when Mr. Simpson did, these same conditions were reimposed or established?

A. Yes, they were. Mr. Simpson brought in his credentials and we sent him up for a medical. He accepted, brought in his credentials, brought in his medical and we assumed he would start when we were ready to go.

ADDENDUM

Section 7 of the National Labor Relations Act (29 U.S.C. §157)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1), (3) & (5) of the National Labor Relations Act (29 U.S.C. §158(a)(1), (3) & (5))

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9 of the National Labor Relations Act (29 U.S.C. §159)

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Section 10(c) of the National Labor Relations Act (29 U.S.C. §160(c))

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.

Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
v.	:	No. 75-4037
BAUSCH & LOMB, INC., Respondent.	:	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the brief for Respondent, Bausch & Lomb, Inc., in the above-captioned case have this day been served by first class mail upon Elliott Moore, Esq., Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D. C. 20570.

Dated: Rochester, New York
July 9, 1975

Gerald L. Paley